State of Rhode Island and Providence Plantations

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Peter F. Kilmartin, Attorney General

December 3, 2015
OM 15-19

Michael J. Marcello, Esquire

RE: Marcello v. Scituate School Committee

Dear Attorney Marcello:

The investigation into your Open Meetings Act ("OMA") complaint filed against the Scituate School Committee ("School Committee") is complete. By correspondence dated March 15, 2015, you allege the School Committee violated the OMA during its November 18, 2014 meeting when it began the meeting in executive session, yet there was no open call indicating it would convene into executive session. You also allege that the School Committee did not record the vote to convene into executive session. You further allege that the School Committee convened into executive session for an improper purpose. More specifically, you allege the School Committee convened into executive session pursuant to R.I. Gen. Laws § 42-46-5(a)(2) – sessions pertaining to collective bargaining or litigation - yet none of the school department employees are members of collective bargaining units and litigation was not pending or reasonably anticipated. You also allege that the School Committee failed to disclose the executive session vote to grant raises. Finally, you contend the School Committee violated the OMA during its January 6, 2015 executive session meeting when it discussed topics in executive session that were not listed on the agenda.[1]

In response to your complaint, we received a substantive response from the School Committee's legal counsel, David M. D'Agostino, Esquire. Attorney D'Agostino states, in pertinent part:

> "The Committee did not violate the OMA on November 18, because it properly convened into Executive Session. The Executive Session

[1] You have also indicated that the School Committee failed to properly post its November 18, 2014 agenda, but you provide no facts to support this allegation. Rather, this allegation appears to be better categorized in support of your allegation that the School Committee failed to articulate an open call prior to convening into executive session.

> Meeting Minutes are prepared using a pre-designed minute format that has two (2) columns for record-keeping purposes. * * *[2]
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> The 'Call to Order' is listed as the first item in the left column. The written minutes reflect that, 'The Executive Session was called to order by Chair Umbriano at 6:02 PM.' This was merely a reflection that the meeting itself was being called to order. Since the Committee was not already convened into Closed/Executive Session, this call to order could only have occurred in open session. Thus, the meeting was in fact opened into an open session.
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> * * *
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> The next thing that occurred was that Committee Member LaPlante moved to convene into Executive Session, which was seconded and voted unanimously. (Thus, the motion and the vote of each member was recorded as required by the OMA). The minutes reflect the purpose of the Executive Session (again in the left-hand column) and the language for each item is noted and the Committee repeated the specific item before discussion on the same. Following the call to order, there was a motion made to convene into Closed/Executive Session for the reason(s) set forth in the agenda and reflected in the minutes of the meeting.
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> So, the meeting could not have been begun in Executive Session, because there was a motion made to convene into Executive Session, following the 'Call to Order.' In addition, the vote to convene into Executive Session was recorded and reflected in the meeting minutes. * * *
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> [A]ll of the employees mentioned in the discussion (i.e. school bus monitors; administrators; consultants; school committee secretary; call clerk secretary; mail courier; coaches; and, extracurricular activity advisors) at the very least have certain vested and/or Constitutionally-guaranteed rights concerning employment in their capacity as public employees. The fact is that the administrators all have existing contracts with the School Department; they all have certain rights under those contracts; therefore, discussions about terms and conditions of employment, specifically, the Committee's strategy for addressing wage increases, if at all, are proper matters for Executive Session under RIGL § 42-46-5(a)(2).
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[2] Attorney D'Agostino provided a copy of the sealed executive session minutes for the November 18, 2014 meeting for this Department's in camera review.

> [T]he Committee concedes that it did not properly disclose the vote to give wage increases. This should have been disclosed following the reconvening to Open Session, and that did not happen. That said, the Committee * * * not only admitted it during the March 15, 2015 Open meeting, but had an agenda item included in the Open Session to specifically address and/or correct the fact that the prior vote on wage increases was not disclosed.
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> * * *
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> [T]here is an audio recording of the January, 2015 meeting that might shed light on the allegation and the Committee's defense to the claim. However, that recording, while stored on the Solicitor's server will not play and [I have] been unable to copy the file to another source, such as a thumb drive. * * *
> There was an Executive Session convened in January, 2015 by the School Committee. The purpose of that Session was to address a matter in active litigation, *to wit*, Scituate Paraprofessional NEARI/NEA (Judith Tata) v. Scituate School Committee, bearing AAA Case # 11-20-1300-0235.
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> What [I] expect and assert would be on the recording is that at the conclusion of discussion with legal counsel as to the status of the above-captioned matter there was a question from [a] Committee Member[] as to what Executive Session protocols were vis-à-vis the OMA. This was not outside the scope of discussions, but rather was an inquiry relating to how the Committee treated its discussions of the instant Executive Session as compared to the recent November 18, 2014 meeting involving the wage increase. There was no substantive discussion about the wage increase; only about how it was reflected (or, in this case, not properly reflected) in the minutes.* * *
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> This was not a discussion of any substantive import * * * but rather a question about OMA compliance, which was subsequently discovered and confirmed to be an issue that was addressed at the March, 2015 meeting.
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> * * *
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> It is the Committee's position that while a violation did occur, it was limited to the November 18, 2014 meeting and limited to the failure to record, in Open Session, the vote taken to grant a wage increase to certain employees. In defense of the Committee, and to provide some additional background to the general issue of OMA compliance, [I have] since January, 2015 been reviewing the protocols of the Committee and [have] been attending Open Session meetings to provide real-time assistance with

> OMA-related questions and issues that come up from time to time at meetings.
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> * * *
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> To the Committee's credit, when it was conclusively determined that there was a failure of OMA compliance concerning the November 18, 2014 wage increase vote, actions were taken to 're-do' that vote and the Committee made public statements explaining the error, and its actions to correct the same as of the March 3, 2015 meeting."

We acknowledge your rebuttal dated May 1, 2015.

At the outset, we note that in examining whether a violation of the OMA has occurred, we are mindful that our mandate is not to substitute this Department's independent judgment concerning whether an infraction has occurred, but instead, to interpret and enforce the OMA as the General Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the School Committee violated the OMA. See R.I. Gen. Laws § 42-46-8. In other words, we do not write on a blank slate.

The OMA provides:

> "[b]y open call, a public body may hold a meeting closed to the public upon an affirmative vote of the majority of its members. * * * The vote of each member on the question of holding a meeting closed to the public and the reason for holding a closed meeting, by a citation to a subdivision of § 42-46-5(a), and a statement specifying the nature of the business to be discussed, shall be recorded and entered into the minutes of the meeting." R.I. Gen. Laws § 42-46-4(a).

An "open call" is defined as "a public announcement by the chairperson of the committee that the meeting is going to be held in executive session and the chairperson must indicate which exception of § 42-46-5 is being involved." R.I. Gen. Laws § 42-46-2(b). This Department has long made clear that in order to properly convene into executive session, a public body must articulate an open call and this open call must be articulated in open session. See Balzar v. Jamestown School Committee's Administrative Search Committee, OM 97-01. Even if a public body convenes a meeting for the sole purpose of adjourning into executive session, the public body must begin its meeting with an open call articulated in open session. Additionally, "[a]ll votes taken in closed sessions shall be disclosed once the session is reopened; provided, however, a vote taken in a closed session need not be disclosed for the period of time during which its disclosure would jeopardize any strategy, negotiation or investigation undertaken pursuant to discussions conducted under § 42-46-5(a)." R.I. Gen. Laws § 42-46-4(b).

Upon review of the November 18, 2014 open session meeting minutes, your complaint, and our in camera review of the executive session meeting minutes, it appears the School Committee violated the OMA when it memorialized its open call in the executive session meeting minutes, rather than the open session meeting minutes. See Beagan v. Albion Fire District, OM 12-08. Additionally, the vote of each member on the question of holding a meeting closed to the public and the reason for holding a closed meeting, by a citation to a subdivision of R.I. Gen. Laws § 42-46-5(a), and a statement specifying the nature of the business to be discussed, was not recorded or entered into the open session minutes, but was instead memorialized in the executive session minutes. These matters should have been recorded in the open session meeting minutes, and as such, the School Committee violated the OMA.[3]

Additionally, and by its own admission, the School Committee violated the OMA when it failed to disclose the vote upon returning to open session. See R.I. Gen. Laws § 42-46-4(b). Although a vote taken in a closed session need not be "disclosed for the period of time during which its disclosure would jeopardize any strategy, negotiation or investigation undertaken pursuant to discussions conducted under § 42-46-5(a)," there was no evidence presented that any potential jeopardy existed. R.I. Gen. Laws § 42-46-4(b). Accordingly, the School Committee violated the OMA when it failed to disclose the executive session vote upon reconvening into open session.

The OMA further mandates that all meetings of all public bodies be held in open session, unless otherwise exempt. See R.I. Gen. Laws § 42-46-3. Among the enumerated exceptions is R.I. Gen. Laws § 42-46-5(a)(2), which permits a public body to convene into executive session for "[s]essions pertaining to collective bargaining or litigation, or work sessions pertaining to collective bargaining or litigation." In Walsh v. Charlestown Town Council, OM 00-03, we reviewed an executive session convened pursuant to the so-called "collective bargaining" exemption wherein the Charlestown Town Council discussed and voted upon a Town Administrator's contract in executive session. After reviewing various cases and definitions of "collective bargaining," this Department determined that "in order for a public body to convene properly into executive session pursuant to the collective bargaining exception, the OMA requires that the executive session include the employer and a representative/organized union for the employees." Id. With particular significance to the issue at hand, we continued in Walsh that "[h]enceforth, this Department will not consider negotiations with a non-union individual

[3] You also contend that the School Committee violated the OMA when it began its executive session in closed session, rather than in open session. To be sure, as explained above, the School Committee violated the OMA by recording its open call in the executive session minutes and not the open session minutes, but the evidence is less clear whether the School Committee actually began its meeting in open session. You provided no direct evidence that you, or any other member of the public, were excluded from witnessing the open call, although the fact that the open call was recorded in the closed session minutes might suggest this conclusion. In any event, our above discussion concerning the open call suffices to address this issue.

employee * * * or negotiations with a group of non-union employees * * * to constitute 'collective bargaining' for purposes of the OMA." Id. Instead, we related, "'collective bargaining is simply the negotiation between an employer and the representative union.'" Id.

Since its adoption in 2000, the Walsh rule has never been modified. In In re Tiverton Town Council, ADV OM 02-01, for example, we were asked whether an executive session to "discuss the terms of a contract to be offered to an individual who has applied for the open position as a Tax Assessor" would violate the OMA. Citing Walsh, we concluded that since the Tiverton Town Council wished to convene into executive session to negotiate a contract with "non collective bargaining individuals," the Town Council could not convene into executive session pursuant to R.I. Gen. Laws § 42-46-5(a)(2). Despite the impropriety of convening into executive session pursuant to R.I. Gen. Laws § 42-46-5(a)(2), we observed that to the extent that the Town Council was discussing "the job performance, character, or physical or mental health of a person or persons, these discussions may be held in executive session." See R.I. Gen. Laws § 42-46-5(a)(1). Here, however, the School Committee did not convene into executive session pursuant to R.I. Gen. Laws § 42-46-5(a)(1), but instead, convened into executive session pursuant to R.I. Gen. Laws § 42-46-5(a)(2). This is an important distinction. As made clear by Walsh and its progeny, an executive session pursuant to the "collective bargaining" exemption set forth in R.I. Gen. Laws § 42-46-5(a)(2) is not permitted with "an individual who is representing their own interests." See In re Portsmouth School Committee, ADV 04-05. See also Rivet v. Lime Rock Fire District Board of Commissioners, OM 06-11 ("a person who negotiates his/her own employment contract, rather than negotiating on behalf of a representative/organized union, did not engage in collective bargaining as defined by R.I. Gen. Laws § 42-46-5(a)(2))."

As the above makes clear, although the School Committee represents that it convened into executive session in part because these employees "have certain vested and/or Constitutionally-guaranteed rights concerning employment in their capacity as public employees," no evidence has been presented that a representative/organized person/entity was negotiating these parameters on behalf of these employees. Based upon this evidence, we find that the School Committee violated the OMA by convening into executive session pursuant to R.I. Gen. Laws § 42-46-5(a)(2). See also R.I. Gen. Laws § 42-46-4.

Lastly, during the School Committee's March 3, 2015 meeting, you inquired during the public comment section when the School Committee decided to place the item of the salary increases on the March 3, 2015 agenda. Specifically, according to your complaint, you "asked the School Committee how and when did it decide to place item H(12) on the March 3, 2015 agenda. The Superintendent said he could not remember, but one of the Committee's [ ] members * * * disclosed that she had brought it up during the January 6, 2015 executive session of the School Committee." It appears that this statement is the sole basis of your complaint that the School Committee improperly discussed pay raises, or at the very least the topic of disclosing its pay raises, during its January 2015 executive

session meeting. Pursuant to this Department's request, Attorney D'Agostino, on August 20, 2015, emailed this Department a copy of the January 6, 2015 executive session meeting minutes for our in camera review. Attorney D'Agostino reiterated that there was no substantive discussion about the salary increases because that topic was not on the meeting's agenda. Attorney D'Agostino stated there was a question from a School Committee member about when and how the topic of salary increases could be discussed. He informed the School Committee member that it could be put on a future agenda. The topic of salary increases was then scheduled for the March meeting.[4]

The OMA specifically provides that "discussion of a public body via electronic communication * * * shall be permitted only to schedule a meeting." R.I. Gen. Laws § 42-46-5(b)(1). If discussions may occur via electronic communications to "schedule a meeting," we see no reason why the OMA would prohibit these same communications in-person, when such discussions are solely limited to scheduling a meeting and the agenda items. Based upon the evidence presented, we cannot conclude that a substantive discussion about the salary increases occurred at the January 6, 2015 executive session meeting and instead, it appears that this discussion was limited to placing the agenda item on the March 2015 agenda. In the absence of additional discussion outside discussion the scheduling of the meeting and agenda items, we find no violation.

Upon a finding of an OMA violation, the Attorney General "may file a complaint on behalf of the complainant in the superior court against the public body." R.I. Gen. Laws § 42-46-8(a). "The court may issue injunctive relief" and/or "may impose a civil fine not exceeding five thousand dollars ($5,000) against a public body or any of its members" for a willful or knowing violation. R.I. Gen. Laws § 42-46-8(d).

Here, we do not conclude that the School Committee willfully or knowingly violated the OMA. This brings us to the issue of injunctive relief. The School Committee admits that it failed to disclose the vote at the November 18, 2014 meeting. The School Committee, in its response, submits that it disclosed the vote during the March 3, 2015 meeting, but a review of those meeting minutes does not reveal that this "re-do," as Attorney D'Agostino submits, actually occurred. Rather, the minutes reveal that "Mr. D'Agostino offered and suggested a motion to retroactively approve the salary increases," but no motion or vote was taken. While injunctive relief would be appropriate with respect to this violation, we prefer to allow the School Committee the opportunity to remedy the violation on its own. See Tanner v. Town Council of the Town of East Greenwich, 880 A.2d 784, 802 (R.I. 2005) ("By scheduling, re-noticing, and re-voting on the challenged

[4] According to the School Committee, the March 3, 2015 meeting agenda lists item #12 as "Retroactively approve the salary increases discussed during the January Executive Session." The March 3, 2015 meeting minutes indicate that the discussion of the salary increases actually occurred at the November executive session meeting. The error in listing the January meeting date instead of the November meeting date was, according to the School Committee, "a scrivener error, not impacting the substantive business of the Committee."

appointment, the town council, albeit belatedly, was acting in conformity with both the letter and spirit of the avowed purpose of the OMA – to ensure that 'public business be performed in an open and public manner.'"). The School Committee should notify this Department within ten (10) business days to advise of its intentions concerning whether it will voluntarily release the portions of its November 18, 2014 executive session minutes pertaining to this topic and whether it will re-vote and re-consider the salary increase issue in open session. This finding serves as notice to the School Committee that the conduct discussed herein is unlawful and may serve as evidence of a willful or a knowing violation in any similar future situation.

Although the Attorney General will not file suit in this matter, nothing in the OMA precludes an individual from pursuing an OMA complaint in the Superior Court. The complainant may do so within "ninety (90) days of the attorney general's closing of the complaint or within one hundred eighty (180) days of the alleged violation, whichever occurs later." R.I. Gen Laws § 42-46-8. Please be advised that we are closing our file as of the date of this letter, although we reserve the right to reopen this matter should the School Committee not remedy this violation on its own.

We thank you for your interest in keeping government open and accountable to the public.

Very truly yours,

Lisa Pinsonneault
Special Assistant Attorney General
Extension 2297

LP/pl

Cc: David D'Agostino, Esquire